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The labyrinth of the preliminary reference. What is the role of the parties in the current procedural system of the European Union?

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Abstract: This work has attempted, in a comparative manner and with the help of case law, to carry out a brief investigation into the preliminary reference. It is interesting to know the role that the parties play in this type of reference and especially at the procedural stages. The presence before the CJEU, the dialogue between the courts, the referring judge, also as a participating party, the acceptance or not of a reference, the parties before the national judge, the rights protected, the rights denied at the procedural level, the rules of procedure, the rules of the European Union are some of the issues, that we will analyze for the participation of the parties in the preliminary reference.

Keywords: preliminary reference; European Union law; reform of the preliminary reference; dialogue between CJEU and national law; the parties of the preliminary reference.

Introduction

The preliminary reference mechanism, before and after the reform of 2024,¹ continues to assume a particular interest. It is based on difficult balances especially for the maintenance of the primacy of Union law (Liakopoulos, 2019) as well as the loyal cooperation between judicial bodies, which guarantee a profitable value to national judges in the relative interpretation and implementation of Union law (Barav, 2008; Malemovský, 2013; Jacobs, 2015; Jacquè, 2018).

The national judge evaluates the opportunity to initiate the referral mechanism at the CJEU, as an indispensable response to the solution of a dispute pending before him. The jurisdiction of the CJEU, by way of preliminary ruling, is valid for Union law, which is exercised on the exclusive initiative of national judges.

The national judge in front of a dispute assumes the responsibility of a jurisdictional decision, which is up to him to evaluate the circumstances of each case requiring and proposing a request for a preliminary ruling capable of issuing a decision relevant to the questions, which are already posed by the CJEU (Broberg, Fenger, 2021; Pertek, 2021).

Art. 267 TFEU is binding on the needs of allowing the national judge to put forward all the elements useful for the law of the Union and to issue its judgment. A party and/or all the parties,

¹Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, PE/85/2023/REV/2, OJ L, 2024/2019, 12.8.2024.

that are submitted to the CJEU, do not oblige the national judge to make a preliminary reference (Broberg, Fenger, 2022).

The parties to the main proceedings, that are part of the case, raise questions that have to do with the law of the Union or to oppose the referral. They also have the power to identify the specific object of the preliminary reference as well as to withdraw. Moreover, the parties force the national judge towards this solution by entering into an agreement before even resolving the dispute.²

A national judge, thus proposes a preliminary reference. In practice, the national judge has the competence to decide to refer and the initiative to propose a referral, which comes from the parties as well as from national procedures that are significant. As can be seen in the national legal systems, the role of the advocate is important in Ireland and Denmark. Preliminary references begin after a request from the parties. They submit the appeal and the related defence brief to the national judge. Preliminary questions are also presented to the CJEU. There is also the possibility for the referring judge to modify the wording of the party's proposal.

²CJEU, 16 June 1981, C-126/80, *Salonia v. Posdomani and Ciglio*, ECLI:EU:C:1981:136, I-01563; 19 December 2018, C-375/17, *Stanley International Betting and Stanleybet Malta*, ECLI:EU:C:2018:1026, published in the electronic Reports of the cases.

The national judge decides autonomously whether or not a preliminary question arises against the relative will of both parties.³ The main proceeding is suspended since:

“(...) it concerns the aspects of the latter which may be affected by the Court’s response to such a question (...)”.⁴

Thus, it provides for a precautionary suspension for internal acts, as well as for acts implementing the sources of law, which concern the validity of the CJEU, which is called upon to rule. In general terms, also he takes provisional measures avoiding the position of the parties, in an irremediable manner upon the expiry of the relative necessary time.

After the CJEU responds to the national judge. In the presence of a consensual referral and at the moment, that all the parties to a dispute are in favour of asking a question to the CJEU, the national judge proceeds in an essential way to assist the CJEU for the resolution of the case. Consulting the parties on issues before submitting the reference to the CJEU is beneficial for the judge, who seeks to avoid complications after receiving useful information to correct, integrate the reported facts and allow to make more pertinent questions (Edward, 1987).

³CJEU, 11 March 1999, C-100/96, British Agrochemicals Association, ECLI:EU:C:1999:129, I-01499. Judge Brooke of the English High Court has highlighted that the preliminary reference for both parties has had a significant delay. Therefore the judge of the High Court has tried to give an answer by resolving the dispute taking into account the economic and procedural cost of the cause of a preliminary ruling by interpreting the directive accordingly.

⁴CJEU, 17 May 2023, C-176/22, BK and ZhP, ECLI:EU:C:2023:416, published in the electronic Reports of the cases, par. 23.

The national judge considers, that the reference is not necessary and decides the issue even before an appeal with the help of the CJEU. During the preparation of the case there are doubts regarding the application of Union rules, which are not relevant and which invite observations regarding the need for a preliminary reference.

Art. 23, par. 1 of the Statute of the CJEU affirms, in this regard, that:

“(...) the decision by which the referring judge refers to the Court suspends the proceeding (...). The provision cannot be understood as prohibiting that judge from referring a case (...). Hearing the parties on the answers to be given to the questions put to it in the context of the cooperation procedure is established by Article 217 TFEU (...)”.⁵

The parties to the preliminary ruling mechanism affect the application, which it cancels and reaches an out-of-court settlement, that survives the cessation of the matter it contains.⁶

In a precise manner, the request of the parties does not determine the referral of the application only if the referring judge asks the CJEU to cancel its request for a preliminary ruling from its register, according to Art. 100 of the rules of procedure. The parties may also determine the transfer of the case to another judge, who has jurisdiction and according to the hypothesis that it is up to the new national judge to take up the

⁵CJEU, 22 June 2023, C-711/21 and 712/21, *Belgian State* (filéments postérieurs à la décision de retour), ECLI:EU:C:2023:503, par. 46.

⁶CJEU, order of 12 March 2009, C-132/07, *Beecham Group and others*, ECLI:EU:C:2009:145, I-01775.

preliminary ruling.⁷

Art. 23 of the Statute and Art. 97 of the rules of procedure of the CJEU qualify the parties of the preliminary ruling.

The relevant role calls for the discipline of the combined provisions of Artt. 23 and 23bis of the Statute as well as of Art. 96 and 97 of the regulation of procedure of the CJEU (Granger, 2006; Krommendijk, 2016).⁸

In particular, Art. 97 of the rules of procedure allows the referring judge to identify the parties of the main proceedings, which are in accordance with the national procedural law. The notion coincides with the stability of the legal system of each Member State. The parties, i.e. natural and legal persons, have a status in the dispute pending before the national judge.

The parties are present at the trial *a quo* and are interested in defining the dispute, with the necessary manner of presenting themselves at the national trial, as interveners and without distinction to the title of employee, autonomous, obliged, *amicus curiae*, thus acquiring the qualification of a procedural party

⁷CJEU, 29 January 2020, C-371/18, *Sky and others*, ECLI:EU:C:2020:45, published in the electronic Reports of the cases.

⁸CJEU, 6 October 2015, C-61/14, *Health Horizon*, ECLI:EU:C:2015:655, published in the electronic Reports of the cases, par. 31, 32-33: “(...) the “parties to the main proceedings”, within the meaning of Article 97(1) of the Rules of Procedure, are determined as such by the referring court, in accordance with the provisions of national law. Consequently, it is for the referring court to determine, in accordance with national procedural rules, the parties to the main proceedings pending before it. It is not for the court to verify whether a decision of the referring court allowing an intervention before it has been adopted in accordance with those rules. The court must abide by that decision as long as it has not been revoked under the remedies available under national law (...)”.

before the CJEU. The national judge evaluates the function of the preliminary reference, as an interest in the specific case, that does not admit, who acts for his own objective of participation in the trial before the judge of the Union. The control of the CJEU did not verify:

“(...) the order of referral, which has been adopted in accordance with the national rules of judicial organization and procedure (...) The Court must abide by the order of referral issued by a judge of a Member State (...) following the experimentation of any judicial remedies provided for by national law (...)”.⁹

The use of the term of preliminary reference starts in a generic way with the subjects, who act in their own national process. It refers to the substantial relationship, that is deduced in court. The procedural part outside the ownership of the legal relationship is controversial and also includes third parties, who intervene in the process only if supporting their reasons without, therefore, asserting their own right.

The procedural capacity is borrowed from the Member States. It is included to the CJEU. This has the power to take documents in the preliminary proceedings for those who do not have the quality of the party of the process before the referring judge.¹⁰

Therefore, those who do not have a main cause, as a quality of the party, who is in dispute cannot be entitled to present

⁹CJEU, 14 January 1982, 65/81, *Reina*, ECLI:EU:C:1982:6, I-00033, par. 7 -8. V. 3 March 1994, C-332/92, C-333/92 e C-335/92, *Eurico Italia and others*, ECLI:EU:C:1994:79, I-00711, par. 13; 16 September 1999, C-435/97, *World Wildlife Fund and others v. Autonome provinz Bozen*, ECLI:EU:C:1999:418, I-05613, par. 33. 3 October 2000, C-371/97, *Gozza and others*, ECLI:EU:C:2000:526, I-07881, par. 30.

¹⁰CJEU, 19 December 1968, C-19/68, *De Cicco*, ECLI:EU:C:1968:56, I-00689.

observations of a preliminary nature before the CJEU, which are proposed by the referring judge.¹¹ A party to a national judicial proceeding cannot also be heard as different from the main proceeding (Barents, 2020).¹² In this way, participation in the preliminary proceedings is ensured without the parties failing to have filed their intervention with the referring judge and, after the referral order, to escape the relative assessment of admissibility.

The subject, who intervenes as *amicus curiae*, before the judge *a quo* is considered as a party, according to Art. 25 of the Statute. The CJEU declares as inadmissible the briefs and observations submitted in writing by subjects, who are not entitled to participate in proceedings.¹³

The limits on the participation of third parties is the basis for serious prejudices. For the hypotheses of referrals and of questions submitted by national judges at different times, the CJEU decides by omitting the oral phase of the proceedings. In fact, through an order, which should be reasoned and refers to the previous judgment, it omits the oral phase of a proceeding.

¹¹CJEU, order of 3 June 1964, 6/64, *Costa v ENEL*, ECLI:EU:C:1964:66, ECR 01141. 9 June 2006, C-305/05, *Ordre des barreaux francophones et germanophone and others*, ECLI:EU:C:2006:383, I-05305, par. 9. order 12 September 2007, C-73/07 *Satakunnan Markkinapörssi and Satamedia*, ECLI:EU:C:2007:507, I-7075.

¹²CJEU, 27 February 2014, C-470/12, *Pohotovost's*, ECLI:EU:C:2014:101, published in the electronic Reports of the cases, par. 23.

¹³CJEU, 19 December 1968, C-19/68, *De Cicco*, op. cit., par. 632: "(...) The appellant's lack of interest would deprive the Sozialgericht's decision of any legitimate basis (...) dispute would fundamentally concern the Italian social security institutions, they should have been called to court, whereas they were not (...)".

As a consequence, the parties of the treaty referrals do not have the possibility to assert their reasons (Naômè, 2010; Anastasopoulos, 2024).

This is a restriction on the admission of persons, who have assumed the role in partem.¹⁴ The total absence of a subject to act and take part in the proceedings before the Luxembourg is obvious and indisputable.

The abuse has often been criticized by the judge of the Union in a severe way considering that the right to participate in the proceedings, according to Art. 267 TFEU is not granted to third parties.¹⁵

As parties to the dispute are indicated the qualities in the dispute pending before the national judge, being a precise rule. The discipline of referral does not make sense for the right to participate in the proceedings, that recognizes all interested parties. The CJEU has denied to present observations to a

¹⁴CJEU, 1st March 1973, 62/72, Bollmann v. Hauptzollamt Hamburg Waltershof, ECLI:EU:C:1973:24, I-00269, par. 1ss.

¹⁵CJEU, 4 October 2011, C-403/08 and C-429/08, Football Association Premier League and others, ECLI:EU:C:2011:631, I-09083, par. 9: “(...) the status of “party to the main proceedings” within the meaning of Article 9(1) of the Rules of Procedure, read in conjunction with Article 23 of the Statute of the Court of Justice, to a person, and that person may not be admitted to proceedings before the Court pursuant to Article 2(7) TFEU (...) his application to intervene before a national court not in order to take an active role in the prosecution of the action before the national court, but solely in order to participate in the proceedings before the Court (...)”. However, the same line of thought is not seen in all the occasions involving the judge of the Union who has obtained a different result and who respects the resolution of the main dispute. The referral has as its object a fictitious dispute of an internal proceeding and with the aim of declaring to the CJEU the relative incompatibility with the law of the Union within a rule of a state that is different from that of the forum. CJEU, 11 March 1980, 104/79, Foglia v. Novello, ECLI:EU:C:1980:73, I-00745.

subject, who has not requested intervention before the national judge.¹⁶

The notion of Art. 97 of the rules of procedure seems to be shaped. It is related to the qualification of a party that is attributed by the legal system of a member state. The choice for the national judge to make and decide who admits the trial and who does not, remains excluded from the jurisdiction of the CJEU.

The lack of a common definition of the notion of party creates some problems. The elastic conception, that expands and restricts the content attributed to national headquarters, is found in the nature of the process. This is a position, which should find room for the intervention of a process suspended for prejudicial reasons and in the quiescent phase to a process mainly administrative for preliminary reference to national law.

The national legal system accepts, in a restrictive manner, the notion of the party and also limits the parties, that are different from the principal ones. The intervention in a national process in some way leads to a favorable outcome for the national judge, who ensures and assumes a role in the action before the manifestation of a context of the procedure before the CJEU.

Apart from these criticisms, the CJEU adheres to the relative provision of the referral, which is issued by the national judge,

¹⁶CJEU, 23 January 1997, C-181/95, *Biogen v. Smithkline Beecham Biologicals*, ECLI:EU:C:1997:32, I-00357, par. 6.

thus involving the parties to the relative provision, which revoke the experiment of jurisdictional remedies, which are provided for in the national procedural system.¹⁷

The parties before the CJEU

When speaking of parties before a court and especially the CJEU, we are referring to a precise totality of legal situations of an active and passive nature. A totality of rights and duties, which enjoy a preliminary procedure, that is established before the CJEU. Through a copy of a preliminary request¹⁸ in the registry, a deadline of two months is set within, which the briefs will be filed in the language of the proceedings and with the prior authorization of the CJEU in an official language.

The deadline can be extended for another ten days, according to Art. 51 of the rules of procedure. It is understood that the

¹⁷CJEU, 11 March 2004, C-309/02, Radlberger Getränkegesellschaft and S. Spitz, ECLI:EU:C:2004:799, I-11763, par. 26. 1st December 2005, C-213/04, Burtscher, ECLI:EU:C:2005:731, I-10309, par. 32.

¹⁸CJEU, 22 November 2017, C-251/16, Cussens, ECLI:EU:C:2017:881, published in the electronic Reports of the cases, parr. 63-68. 15 June 2017, C-349/16, T.KUP SAS, ECLI:EU:C:2017:469, published in the electronic Reports of the cases, parr. 15-21. 7 February 2018, C-304/16, American Express Company, ECLI:EU:C:2018:66, published in the electronic Reports of the cases, parr. 30, 39 and 40. 12 February 2015, C-662/13, Surgicare, ECLI:EU:C:2015:89, published in the electronic Reports of the cases, parr. 16 and 21. 4 May 2016 C-477/14, Pillbox 38, ECLI:EU:C:2016:324, published in the electronic Reports of the cases, parr. 28-29. regardless of the previous causes there is also the case to another case. When the national judge refers to the observations of the parties in a main case that contains different expositions for the dispute before the pending case, the possibility for the interested parties to also present observations is not guaranteed. In this case the preliminary reference is not accepted. See also the case: 2 March 1999, C-422/98, Colonia Versicherung, ECLI:EU:C:1999:113, I-01279, par. 8.

observations arrive with the relative delay and are rejected. The CJEU declares, as admissible, the relevant filing of written observations by the intervening parties, which are admitted to the main proceedings of the referring court without constituting a risk to the principle of good administration of justice, as well as to the processing of the case within a reasonable time without accepting the relevant request for:

“(...) written observations filed by natural and legal persons other than those involved at the date on which the request for a preliminary ruling was introduced, in order to avoid the proceedings turning into *actio popularis* (...)”.¹⁹

The observations, written submissions of the parties are recognized by the CJEU through the knowledge of elements of fact and law, which are sufficient to allow the provision of an interpretation of provisions of the Union, which are relevant to the circumstances, which are the subject of the main proceedings and after the order for reference, which appears to characterize some ambiguities, in this regard.²⁰

If the national judge simultaneously submits requests for preliminary rulings, which are related to identical cases but present precise different elements the parties may submit written

¹⁹4 maggio 2016 C-477/14, Pillbox 38, op. cit., par. 30.

²⁰CJEU, 7 February 2019, C-49/18, *Escribano Vindel*, ECLI:EU:C:2019:106, published in the electronic Reports of the cases, par. 28. 3 December 2015, C-312/14 *Banif Plus Bank*, ECLI:EU:C:2015:88, published in the electronic Reports of the cases, parr. 36-42. 2 April 2009, C-260/07, *Pedro IV Servicios*, ECLI:EU:C:2009:215, I-02437, par. 30. 8 September 2009, C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, ECLI:EU:C:2009:519, I-07633, par. 39-43. 26 October 2016, C-506/04, *Yara Suomi*, ECLI:EU:C:2016:587, I-08613, par. 40-41.

observations to the CJEU.²¹ The subject matter of the request it is not, however, extended over the limits, which are pre-established by a national judge,²² proposing the interpretation of a provision, which is controversial and seeking to argue for reasons of invalidity (Montag, 2008).

In this way, the judge makes explicit the requests, that refer to a referral concerning the parties. It is necessary, in this phase, that the information of the ordinance become integrated with the elements, that are part of the written observations, allowing the interested parties to take a position regarding the interpretation of rules, which are relevant to the CJEU and that with a sufficient manner recognize in fact and law what can be created. Through a written procedure the parties as recipients of requests, briefs, observations, defenses and replies, and of any type of act, copies of compliant certificates, etc., need time and are based on Art. 20 of the Statute.²³

²¹CJEU, 13 March 2008, joined cases C-383/06 and C-385/06, *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and others*, ECLI:EU:C:2008:165, I-01561.

²²CJEU, 1st March 1973, 62/72, *Bollmann v. Hauptzollamt Hamburg Waltersdorf*, op. cit., par. 4. 11 July 1997, C-261/95, *Palmisani v. INPS*, ECLI:EU:C:1997:351, I-04025, par. 31.

²³CJEU, 6 December 2005, joined cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA and others*, ECLI:EU:C:2005:741, I-10423, par. 49. 23 January 2003, joined cases C-421/00, C-426/00, and C-16/01, *Sterbenz and Haug*, ECLI:EU:C:2003:46, I-01065, par. 21. 21 September 1999, joined cases C-115/97 and C-117/97, *Breentjens*, ECLI:EU:C:1999:434, I-06025, par. 41. 12 November 1998, C-399/96, *Europièces v. Sanders e Automotive Industries Holding Company* ECLI:EU:C:1998:532, I-06965, par. 24. 11 April 2000, joined cases C-51/96 and C-191/97, *Deliège*, ECLI:EU:C:2000:199, I-02549, par. 38. 5 October 1994, joined cases C-133/93, C-300/93, and C-362/93, *Crispoltini and others*, ECLI:EU:C:1994:364, I-04853, par. 18 and 19.

Compliance with procedural organization measures, through the provision of investigative measures, allows the CJEU, after a declaration by the three Advocates General, to request clarifications from the referring judge within the established time frame.

The response is then notified to the interested parties in accordance with Article 101 of the Rules of Procedure. Further clarifications are also obtained, and the CJEU allows the parties to the main proceedings and other authorized persons to submit observations in the preliminary proceedings as well as the opportunity to comment during the oral proceedings.

In practice, this possibility appears to be rare given the deficiencies and referral orders that are difficult to address through subsequent amendments that clarify the needs of the parties involved. Furthermore, it is the national judge himself who has the difficulty in reconciling the relevant request with the procedural rights of the parties to the main proceedings.

The CJEU invites parties and interested persons to respond in writing and in a necessary way, within a pre-established time frame.²⁴ Open and optional is also the possibility of submitting a deadline for information, that is related to documents considered

²⁴CJEU, 9 April 2014, C-225/13, *Ville d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2014:245, published in the electronic Reports of the cases, par. 26: "(...) should be noted that the file transmitted to the Court and the replies given by the interested parties to the written question addressed to them by that court in accordance with Article 11(1) of the Rules of Procedure of the Court reveal significant divergences as to the scope of the provision at issue in the main proceedings (...)".

relevant as well as answers and documents provided, communicated to other parties, to third parties and questions that respond precisely to the relevant hearing.²⁵ If a new party enters when the case is pending before the CJEU, trying to avoid delays relating to procedural times, take into account the state that is found and exercises procedural faculties already passed. The communication of the documents is also notified to the interested parties.²⁶

If the submission of observations and briefs is not made in the written phase, this fact does not prejudice the participation of the parties in the oral phase, according to Art. 97, par. 3 of the rules of procedure. Thus, the parties represent themselves adequately and precisely before the rules of national law. If permitted by the national legal system, the parties have a non-lawyer to defend themselves.²⁷

²⁵CJEU, 9 March 2010, C-378/08, *ERG and others*, ECLI:EU:C:2010:126, I-01919, par. 71-78. ²⁶May 2005, C-20/03, *Burmanjer*, ECLI:EU:C:2005:307, I-4133, par. 8.

²⁶CJEU, 6 October 2015, C-61/14, *Orizzonte salute*, op. cit., par. 37-38: "(...) It is incompatible with the principle of sound administration of justice and with the requirement to deal with questions referred for a preliminary ruling within a reasonable time that the written procedure before the Court, by reason of successive admissions of interventions and the two-month period laid down in the second paragraph of Article 23 of the Statute of the Court of Justice for the submission of written observations by those interveners, cannot be concluded or that the written part of the procedure must be reopened. It is in this context that Article 97(2) of the Rules of Procedure of the Court provides that (...) Court of the intervention of a new party in the main proceedings, and the case is already pending before the Court, the new party is to agree to take over the case in the state in which it finds itself on the date of that information (...)".

²⁷CJEU, 25 January 2011, C-382/08, *Neukirchinger*, ECLI:EU:C:2011:27, I-00139.

According to Art. 83 of the rules of procedure, at any time the Advocate General orders the reopening of an oral phase of the proceedings if he does not consider himself sufficiently informed. After the closure of this phase a party may

“(...) decisively influence the decision of the Court, or when the case is to be decided on the basis of an argument which has not been the subject of discussion (...)”.²⁸

In fact, the advanced requests for the direct parties, who assert the existence of new facts, that decisively influence the decisions of the CJEU, are known. In the event of disagreement, the decision for the judgment of the cases outside the own conclusions of the Advocate General should be consistent with the observations of the European Commission (Lenaerts, 1994).²⁹

It is reopened an oral phase when the Advocate General's conclusions are omitted. In this case, the elements of the parties, that concern the debate in question, are opened and taken into account. In this way, the conclusions have a position on elements that are not addressed by the parties.³⁰ They are also based on a check, that does not lack aspects relating to the

²⁸CJEU, 12 December 2013, C-361/12, Carratù, ECLI:EU:C:2013:830, published in the electronic Reports of the cases, par. 18; 15 December 2022, C-753/21 and C-754/21, Instrubel NV, ECLI:EU:C:2022:987, published in the electronic Reports of the cases.

²⁹CGUE, 7 July 2022, C-257/21 and C-258/21, Coca Cola European Partner Deutschland, ECLI:EU:C:2022:529, published in the electronic Reports of the cases, par. 27 ss.

³⁰CJEU, 8 September 2022, C-98/21, Finanzamt R (Dédution de TVA liée à une contribution d'associé) ECLI:EU:C:2022:645, published in the electronic Reports of the cases par. 28.

factual, technological and legal context of the dispute of the main proceeding.³¹

The same applies also to the conclusions presented by another Advocate General, who is part of a similar proceeding.³²

The CJEU has limited itself to the Statute and to the rules of procedure, which provide for the possibility for the interested parties to file the relevant observations in response to the conclusions, that are already presented by the Advocate General.³³

The conclusions of the Advocate General are placed back in the request for a preliminary ruling for the referring court and for the parties to the main proceeding. The CJEU is not bound to follow conclusions, which reopen the oral phase. In that case,

“(...) the Advocate General raises a point of law which has not been the subject of discussion between the parties (...)”.³⁴

Contrary to the views of an interested party, who respects the conclusions of the Advocate General, the issues under

³¹CJEU, 8 September 2022, C-716/20, RTL Television, ECLI:EU:C:2022:643, published in the electronic Reports of the cases par. 48 and 51.

³²CJEU, 6 October 2021, C-487/19, W. Ż. () and des affaires publiques de la Cour suprême-nomination), ECLI:EU:C:2021:798, published in the electronic Reports of the cases par. 58-67.

³³CJEU, 25 October 2017, C-106/16, Polbud-Wykonawstwo, ECLI:EU:C:2017:804, published in the electronic Reports of the cases, par. 23. 2 April 2020, C-753/18, Stim and SAMI, ECLI:EU:C:2020:268, published in the electronic Reports of the cases, par. 22. 3 September 2020, C-186/19, Supreme Site Services and others, ECLI:EU:C:2020:638, published in the electronic Reports of the cases par. 37.

³⁴CJEU, 12 January 2023 C-702/20 and C-17/21, Dobeles Hes, ECLI:EU:C:2023:465, published in the electronic Reports of the cases par. 87.

examination, do not constitute a valid reason, which justifies the reopening of the oral phase. According to Art. 102 of the rules of procedure, it is noted that “the referring court shall rule on the costs of the preliminary ruling proceedings”. For the liquidation of the costs, which are incurred by the parties in the main proceedings and for reasons of preliminary ruling proceedings, the rules of national law are governed since they are not favourable and concern incidents of a procedural nature, which are similar and arise in a context of litigation de quo, which is in accordance with national law.³⁵

The reference to an expedited procedure and to an urgent one, relating to the area of security, freedom and justice show that, according to Art. 23 of the Statute, have a short deadline. As an exception to this rule is art. 20, par. 3, which provides that the Advocate General does not present his conclusions.

The urgent procedure provides for the limitation of the parties and others, who are interested in filing written observations based on extreme urgency, as well as the omission of a written phase for the procedure.

³⁵CJEU, 6 December 2001, C-472/99, *Clean Car Autoservice*, ECLI:EU:C:2001:663, I-09687, par. 32.

The parties before the national judge of last instance

If the preliminary reference does not constitute a remedy available to the parties “the dispute concerns a question of interpretation of Union law”. In this case, it is required to consider that there is a question raised pursuant to Article 217 TFEU.³⁶ It is also true that the request to submit the question to the control of the judge of the Kirchenberg is made by the national judge of last instance with the obligation to ask the CJEU for a relative ruling on the interpretation as well as the validity of a rule of the Union, when doubts arise and not resolve the dispute and/or take a position for the participating parties.

The CJEU considers that the relevant requirement comes from Art. 267 TFEU, lett. 3, which satisfies the right of appeal as a circumstance of the losing party who requests it.

Access to appeal, as satisfaction with a manner independent of the fact that the procedure is different from the party that loses the case, does not consider the right of appeal as granted to a third party, to one of the parties, who have the right to appeal and in cases that this party does not receive other support for its

³⁶CJEU, order 3 July 2014, C-19/14, Talasca, ECLI:EU:C:2014:2049, published in the electronic Reports of the cases, par. 22; 10 January 2006, C-344/04, IATA and ELFAA, ECLI:EU:C:2006:10, I-00403, par. 28. 1st March 2012, C-484/10, Ascafor and Asidac, ECLI:EU:C:2012:113, published in the electronic Reports of the cases, par. 33. order 8 April 2013, C-368/12, Adiamix, ECLI:EU:C:2013:257, published in the electronic Reports of the cases, par. 17. order 14 November 2013, C-257/13, Mlamali, ECLI:EU:C:2013:763, published in the electronic Reports of the cases par. 23.

claims.

The parties do not disagree with the application of Union law to the dispute and in the main case that in itself the judge of last instance has the duty/right to reject and to submit the relevant preliminary question to a party to the main proceedings, which arose at a late time.³⁷

The judge should motivate the rejection of the request for a preliminary ruling for the CJEU also incurring the related violation of Art. 6, par. 1 ECHR and Art. 47, par. 2 CFREU (Sudre, 2021; Kellerbauer, Klamert, Tomkin, 2024).³⁸

The judge of last instance does not refer and burdens the parties with a final decision, which conflicts with the law of the Union. The judge of last instance also highlights the exceptions of an obligation to refer, which he fails to accomplish in the presence of a situation of doubt. For the judge of last instance the obligation to eliminate the argument relating to the interpretation of the Union before it is not relevant.

³⁷CJEU, 18 July 2013, C-136/12, National Council of Geologists and the Competition and Market Authority, ECLI:EU:C:2013:489, published in the electronic Reports of the cases, par. 34.

³⁸ECtHR, 8 April 2014, case n. 17120/09, Dhahbi v. Italy, par. 31: "(...) national courts whose decisions do not provide for judicial remedies under national law are required, when they refuse to refer to the CJEU a question on the interpretation of EU law raised before them for a preliminary ruling, to give reasons for their refusal in the light of the exceptions provided for by the case-law of the Court of Justice (...) to indicate the reasons why they consider that the question is irrelevant, or that the provision of EU law in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious that it leaves no room for any reasonable doubt (...)". ECtHR, 10 April 2012, case n.4832/04, Vergauwen v. Belgium, parr. 89 and 90).

The provision of an object, that interprets the part of the CJEU and/or the assumption of the interpretation of this right with an evident way leaves no reasonable doubt. The exceptions are the subject of various criticisms³⁹ since the judge of the Union did not take into account the confirmation of the validity of the criteria that are included in the CILFIT case (Anastasopoulos, 2024; Weber, 2024).⁴⁰

According to the theory of the acte clair (Rasmussen, 2015), the national judge of last instance excludes any reasonable doubt according to the various linguistic versions, taking, therefore, into account the divergences that are exposed by the parties and that have not deemed to extend the exclusion of a comparative jurisprudence that is proven and recalled by their parties. Thus, it is reiterated that the national judge matures and convinces with the same evidence the judges of last instance of the other Member States.

The CJEU has specified, in this regard, that the national judge has decided not to bring a judicial appeal

³⁹CJEU, Conclusions of the Advocate General Bobek of 15 April 2021, C-561/19, Consorzio Italian Management, ECLI:EU:C:2021:291, published in the electronic Reports of the cases.

⁴⁰CJEU, 6 October 1982, C-283/81, CILFIT, ECLI:EU:C:1982:335, I-03415. 27 March 1963, joined cases 28/62, 29/62 and 30/62, Da Costa en Schaake NV v. Administratie der belastingen, ECLI:EU:C:1963:6, I-00061, par. 5 and 6; 19 February 2002, C-35/99, Arduino, ECLI:EU:C:2002:97, I-01529, par. 24 and 25; 9 September 2015, C-72/14, X, ECLI:EU:C:2015:564, published in the electronic Reports of the cases, par. 58; 9 September 2015, C-160/14, Ferreira da Silva e Brito and others, ECLI:EU:C:2015:565, published in the electronic Reports of the cases, par. 40; 28 July 2016, C-379/15, Association France Nature Environnement, ECLI:EU:C:2016:603, published in the electronic Reports of the cases, par. 47ss

“(…) exempted from that obligation for the sole reason that he has already referred a question to the Court for a preliminary ruling in the context of the same national proceedings (…) may refrain from submitting a question for a preliminary ruling to the Court on grounds of inadmissibility inherent in the proceedings before that judge, without prejudice to compliance with the principles of equivalence and effectiveness (…)” (Weber, 2024).

The violation of Art. 267, par. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024) and the scope of the obligation of judgments of last instance continues to be the subject of numerous national, supranational judgments, according to the failure to comply with an action for infringement,⁴¹ for damages⁴² that determine the violation of the rights of the parties involved in the dispute.

The prejudice is not limited to the cases of an omission referral but also extends to other decisions of the national judge, which are in conflict with the principles of law affirmed by the CJEU in the preliminary ruling. The violation of these principles seems possible, serious and takes into account the damage caused by the injured party in the hypothesis, that it is not potential.⁴³

The compensatory remedy represents in a varied way a justification for the impossibility of receiving real protection, since the exercise of a power to conduct primary integration protection is illegitimate.

A serious violation of the principle of effectiveness for judicial protection and the difficulties, that limit the compensatory

⁴¹CJEU, 6 October 2021, C-561/19, Consorzio Italian Management, ECLI:EU:C:2021:799, published in the electronic Reports of the cases.

⁴²CJEU, 4 October 2018, C-416/17, Commission v. France (Advance payment), ECLI:EU:C:2018:811, published in the electronic Reports of the cases.

⁴³CJEU, 30 September 2003, C-224/01, Köbler, ECLI:EU:C:2003:513, I-10239.

action, when the obligation is violated in itself, is not sufficient for claims for damages, which from a general point of view, are not unfounded and play a role of non-acceptance and suspension.⁴⁴

National judges of last instance have the power to request claims for damages, which has led many to hypothesize, that they continue to be part of the criminal liability for ordinary judges, who do not require at the time, who are obliged to intervene of the CJEU, through the preliminary reference, international principles, constitutional for the dependence of the judge and the reasonable duration of the process.

A defensive attitude for the judge of last instance is presented as a point in his favour which allows for clarifications on the modalities for exercising a referral within the scope of the admissibility review for the hypothesis of the claim that has been formulated by its appellant. Actions for damages, in the absence of other remedies available to the parties, call into question a judgment, that has become final and is in conflict with Union law.

The CJEU reiterates the constraint for national legal systems, which provide for compensation for judicial errors, which are detrimental to rights conferred by the Union, thus denying the existence of frictions between Union law and national

⁴⁴CJEU, Conclusions of the Advocate General Hogan of 9 September 2021, C-497/20, Randstad Italia, ECLI:EU:C:2021:725, published in the electronic Reports of the cases, par. 82

provisions, which do not allow the individual to contest through revision⁴⁵ a judgment for the judge of last instance, which conflicts with his own decision.

Union law does not prevent the relative right to appeal before another higher judge for the decision of a lower court to make a preliminary reference without obliging the latter to comply with the outcome of this appeal.⁴⁶

An appeal decision, which refuses the referral to the CJEU, through an irreconcilable motivation, arises defects of ordinary defect relating to a logic as well as to a revocation, as a natural oversight, which is realized through the revocation case, according to the national civil procedural law. Thus, perhaps a misunderstanding is noted for the judge, who has not taken into consideration, the inadmissibility of the appeal, which is confirmed through the appeal and gives rise to its own revocation.

If a preliminary reference is rejected, based on the rules of national law and the party does not contest, an application statement of the precedent is presented, as a factual error in the behavior of the judge and because of a question, that appears to be incompatible with other internal provisions. Thus, the parties who find themselves at the appeal as motivation decide not to

⁴⁵CJEU, 7 July 2022, C-261/21, F. Hoffmann-La Roche, ECLI:EU:C:2022:534, published in the electronic Reports of the cases.

⁴⁶CJEU, 16 December 2008, C-210/06, Cartesio. ECLI:EU:C:2008:723, I-09641.

operate their preliminary reference. It is also a revocatory error that perceives the procedural acts and documents without the existence of material facts that are connected with the parties.

Revocation and/or compensation action? It will not be a judge of the Union who will give an answer to this question but a national judge who in reality goes outside the rules of the Union. This is a legal case, which concludes definitively after the exhaustion of national remedies and with interests, that are in conflict with the law of the Union, susceptible to a complementary connection of a judgment, which discusses the responsibility of the state for violation of the law of the Union and examining whether the conditions exist for condemnation to compensation for damage to the benefit of the citizen, who violates the prejudice of his rights.

Thus, another doubt of reasonableness arises, in case one party includes the possibility of amending the defect, presenting itself in contrast with the law of the Union, through the effective remedy of speed and as a revocation remedy, that it is attempted to undertake before the same judgment, which has pronounced its own sentence thus admitting the introduction of a judgment of a compensatory nature.

An uncertain outcome, that is based on the ascertainment of the conditions, which access compensation, are consistent with the national legal system. The same error is not considered as unjust

to revocation. The unjust consequences deserve to be also settled in a compensatory way.

A compensatory action constitutes a breach of the protection of rights, which the injured party has omitted for other parties and for the rights of the Union which are not guaranteed, as a remedy which finds its basis in the old Francovich case but without being in reality feasible.

This topic seems to be complex and does not concern only one Member State of the Union, but in reality all Member States. It is worth remembering the case of the Belgian Court of Cassation which followed a consolidated path for the decisions of referral per se and for the damage of the parties, who cannot appeal.⁴⁷ Through the Kobler case⁴⁸ the French Council of State due to the failure to comply with the obligation of referral noted that:

“(…) pas de droit au renvoi préjudiciel dans le chef des particuliers (…)”.⁴⁹

⁴⁷Belgian Court of Cassation, Hof van Cassatie of 30 March 2010 (P.09.1592.N). CJEU, 15 December 2011, C-384/10, Voogtsgeerd, ECLI:EU:C:2011:842, I-13275.

⁴⁸Conseil d'État, Decision of 1st April 2022, n. 443882 (https://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2022-04-01/443882?download_pdf Accessed on 10.09.2025) This is the first case of conviction by the Conseil d'État for violation of the obligation of art. 267, lett. 3 TFEU. The case by CJEU of 4 October 2018, C-416/17, Commission v. France (Advance payment), op. cit., did not alarm the Conseil d'Etat to follow the same path once the violation of art. 267, lett. 3 did not determine the relevant right of the individuals.

⁴⁹Swedish Supreme Court, Decision of 20 December 2022, case Ö5978-21. The European Commission, Reasoned Opinion addressed to Sweden, 12 October 2003, 2003/2161 C(2004)3899.

Equally important, the Swedish Supreme Court has highlighted, that the violation of Art. 267, par. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024) by last instance judgments is a serious procedural error, that has recognized the obligation to refer, which respects the absence of the request of the parties with the condition, that the outcome of the related issue depends on the relative interpretation of a norm of the Union.

The Spanish legal system has identified an alternative solution, that represents a certain model of another reasoning. Reference is made to the so-called “recurso de amparo”, that allows the party to be able to directly address the Constitutional Court.

The motivation, therefore, is the lack of respect of Art. 267, lett. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024) and the violation of the right to effective judicial protection and pre-constitution for the judge, according to Art. 24 of the Spanish Constitution, which states:

“(...) people have the right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests without, in any case, being able to occur the lack of defense. 2. Likewise, everyone has the right to the natural judge predetermined by law (...)” (Alonso Garcia, Baño León, 1990).

It is denied that the referral provided as mandatory and which is equivalent to the right of the parties to a case decides the competent jurisdiction. Union law recognises:

“(...) the provisions of the Constitution, provided that they do not concern fundamental principles and rules which protect inalienable rights of the person (counter-limits) (...) the co-jurisdiction of the Court of Justice for the maximum possible protection of rights has a very different relevance for the system, national and of the Union, considered as a whole (...)”.

The right of the parties to make use of the preliminary reference mechanism, according to Art. 267, par. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024) moves and also has its basis at the European Court of Human Rights (ECtHR). A basis that finds ample space in Art. 6, par. 1 ECHR (Sudre, 2021).

The Greek Court of Cassation was also inspired by this spirit, which rejected a request for a preliminary reference at the CJEU without precise reasons and without even mentioning the request to the appellant. For this reason, the appellant addressed to the ECtHR considered the justification for the refusal that mentions fair trial as violated (Claassen, 2023),⁵⁰ considering that the motivation of the judgment from the Greek Court of Cassation is not evident in the content and the question was considered irrelevant and no further doubts arise but is simply ignored (Lacchi, 2015).⁵¹

According to par. 33 of the sentence it was not duty of the state to put an end to a violation of the ECHR and remedy the consequences. The adoption of measures by the state guarantees the reopening of proceedings before the Court of Cassation and constitutes an adequate remedy for the violation of rights for the

⁵⁰ECtHR, *Georgiou v. Greece* of 14 March 2023, app. no. 57378/18.

⁵¹ECtHR, *Vergauwen and others v. Belgium* (dec.), n. 4832/04, parr. 89-90 of 10 April 2012 is affirmed that: “(...) Article 6, paragraph 1 imposes on domestic courts the obligation to give reasons, in the light of the applicable law, for decisions refusing to refer a question for a preliminary ruling; and that where there is an alleged violation of Article 6, paragraph 1 (...) its task is to ensure that the decision rejecting the reference is duly accompanied by reasons (...)”.

applicants.

A judgment that is not binding pushes national legal systems to allow and request the reopening of proceedings, that are concluded before the jurisdictions and of the decisions that do not provide a judicial remedy to national law and do not take into account the request for a preliminary ruling.

The CJEU has linked the violation of the obligation to refer, according to Art. 6, par. 1 ECHR, with an invitation, that is addressed to the ECtHR within a constraint to its states (Sudre, 2021).

Conclusions

The Regulation amending Protocol No. 3 of the Statute of the CJEU (Iglesias Sánchez, 2022) sought to change the division of competences between the CJEU and the Tribunal in certain matters, according to Art. 267 TFEU (Kellerbauer, Klamert, Tomkin, 2024). This deserves criticism both for enthusiasm and for procedural dark trails in the area of preliminary rulings.

The problems for the interested parties of the reference are linked to the establishment, which offers the interested parties, Art. 23 of the Statute, i.e. the guarantees, that are granted by the CJEU, the Tribunal and the procedural provisions. Recital 9 of the application, that was submitted to the CJEU and is based on Art. 281 TFEU (Kellerbauer, Klamert, Tomkin, 2024), as well

as the new Art. 50-ter, par. 3 of the Statute, is a reality for the coming years.

The grey areas are related to matters that are part of the Tribunal. The subjects included to it concern the excise duties, customs code, tariff classification of goods, monetary compensation and passenger assistance, as well as the greenhouse gas emission trading system.

The CJEU has established specific modalities after the amendment of the rules of procedure and it is up to it to deal with them. Thus, the preliminary reference is part, exclusively, of matters that are dealt with by the Tribunal. The decision of any will of the parties has no possibility of influencing the failure to assert the causes to the Tribunal.

The reform applies to Art. 256, par. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024), according to the question of affirmation of questions, that refer to the CJEU. The Tribunal considers that the case asks for a decision of principle, which compromises the unity and coherence of Union law, that with exceptional manner in:

“(...) serious risks the unity or coherence of Union law will be compromised (...) a decision of the Tribunal on preliminary questions could be subject to review (...)”.⁵²

⁵²CJEU, 17 December 2009, C-197/09 RX-II, M/EMEA, ECLI:EU:C:2009:804, I-12033, par. 62; 28 February 2013, C-334/12 RX-II, Arangio Jaramillo/BEI, ECLI:EU:C:2013:134, published in the electronic Reports of the cases, par. 50; 19 September 2013, C-579/12 RX-II, Commission v. Strack, ECLI:EU:C:2013:570, published in the electronic Reports of the cases, parr. 40ss.

Main and fundamental rights such as legal certainty, speed and procedural economy, which have founded the reform under examination introduce the phases that require further times, such as elements of instability and uncertainty enjoyed by the interested parties, according to Art. 62 of the Statute of the CJEU. Such a reform represents control procedures of an objective nature, that every initiative of the parties concerns.⁵³

In the event of referral to the CJEU the parties are not called to participate to the extent, within the limits highlighted by the relative procedure. In the case of review, the relative decision can be filed before the judge of the Kirchberg through briefs, written observations, which can also be subject to review after one month from notification and participation in the oral phase, which decides to reopen it.

The hypothesis of re-examination sets rigorous requirements, that respect the reference to an hybrid nature and to characteristics that the supreme judge has an interest in the law and the appeal. The answers subject to review have effect for the performance, which the CJEU should decide. Thus, the path of unity and coherence of the law of the Union is compromised.

The decisions affirm the correct principle of law, that is intended to find application to a specific case, that produces effects erga omnes. The possible complications alternate the traditional characteristics of the referral, such as negative repercussions in

⁵³CJEU, 17 December 2009, C-197/09 RX-II, M/EMEA, op. cit., par. 26.

the quality of jurisprudential activity, which discourages the national judge to submit preliminary questions.

The reasons of procedural economy avoid the hypotheses of re-examination and referral to the CJEU. The preliminary questions, that are formulated fall within the sphere of competence of it. It is excluded that the national judge raises questions and introduces problems, which also touch on other matters, that highlight principles of constitutional relevance.

The risk is that the judge of the Union considers, that the ruling is not necessary to resolve a pending dispute before the national judge without a connection, that is sufficient with the subject matter of the case.⁵⁴ The interest of the party/ies is resolved with a judgment from the CJEU with a complete and unsatisfied manner.

The gradual transformation of the preliminary reference mechanism assists the national judge, as a nomophylactic

⁵⁴CJEU, 27 June 2018, C-230/17, Altiner and Ravn, ECLI:EU:C:2018:259, published in the electronic Reports of the cases, par. 22: "(...) The court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Union law (...) sought bears no relation to the actual facts of the main proceedings or their purpose, where the question is hypothetical (...) does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (...)". 24 April 2012, C-571/10, Kamberaj, ECLI:EU:C:2012:233, published in the electronic Reports of the cases, par. 42; 29 January 2013, C-396/16, Radu, ECLI:EU:C:2013:39, published in the electronic Reports of the cases, par. 22; 12 December 2013, C-361/12, Carratu'/Poste Italiane, par. 23; 20 December 2017, C-516/16, Erzeugerorganisation Tiefkühlgemüse, ECLI:EU:C:2017:1011, published in the electronic Reports of the cases, par. 80; 7 March 2018, C-494/16, Santoro, ECLI:EU:C:2018:166, published in the electronic Reports of the cases, par. 21; 3 June 2021, C-942/19, Servicio Aragonès de Salud, ECLI:EU:C:2021:440, published in the electronic Reports of the cases, par. 29.; 10 December 2002, British American Tobacco, C-491/01, ECLI:EU:C:2002:741, I-11453 parr.34 and 35; 4 May 2016 C-477/14, Pillbox 38, op. cit., parr. 24-26.

instrument with erga omnes effects. The change of the reform is intended to strengthen the competences, that remain reserved to the CJEU and to the hypotheses that it calls to pronounce on questions, that concern the unity and coherence of the law of the Union. The participation of third parties should expand the number of subjects that can present briefs, observations in writing having a general scope and value, also impacting the legal systems of the Member States of the Union by taking a position on the participation of interested third parties in a limited way contemplating Art. 23 of the Statute and 97 of the rules of procedure.

We can imagine that the Statute and the rules of procedure will embrace the notion of the Union as a party admitted to be in judgement, thus introducing the intervention of a preliminary procedure before the CJEU and also changing direct appeals. In this way the effectiveness of a jurisdictional protection for third parties is guaranteed, before the procedural autonomy of the states that is renounced.⁵⁵

⁵⁵CJEU, 16 December 1976, C-45/78, Comet, ECLI:EU:C:1976:191, I-02435,13-16; 9 November 1983, C-199/82, San Giorgio, ECLI:EU:C:1983:318, I-03595, par. 14 and 15; 29 March 2007, C-347/04, Rewe Zentralfinanz, ECLI:EU:C:2007:640, I-00235, par. 5; 20 September 2001, C-453/99, Courage and Crehan, ECLI:EU:C:2001:465, I-06297, par. 29; 19 June 2003, C-467/02, Eribrand, ECLI:EU:C:2003:708, I-10895, par. 62; 11 September 2003, C-13/01, Safalero, ECLI:EU:C:2003:447, I-08679, par. 49; 13 March 2007, Unibet, C-432/05, ECLI:EU:C:2007:163, I-02271 par. 43: “(...) appeals aimed at ensuring the protection of rights conferred on individuals by virtue of Community law must not be less favourable than those relating to similar internal appeals (principle of equivalence) (...) render practically impossible or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (...)”.

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